

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S OBJECTION TO THE AMENDED
SCHEDULING ORDER [DKT #1376]**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State") respectfully objects to the portion of the Amended Scheduling Order which denies the State's request that expert reports regarding *all* forms of relief be due on January 5, 2009. This portion of the Amended Scheduling Order is clearly erroneous because it fails to take into account that in an environmental pollution case such as this, it is necessary to characterize the injury suffered *before* the full range of appropriate relief can be determined.

I. Introduction

The Amended Scheduling Order in this case requires the State to provide expert reports regarding the causation, injuries, and all forms of damages, except monetary damages, by April 1, 2008. This approach attempts to combine two discrete parts of the expert analysis in this case into one event. In a complex environmental matter such as this, the first step of analysis must be to characterize the injuries to the environment. After the nature and extent of the injuries are

determined by the State's experts, the various forms of relief that are available to address that injury are analyzed. The character of the injury necessarily determines the type and extent of the relief, and thus logic dictates that relief cannot be fully determined until the injuries are characterized.

II. Procedural Background

On October 15, 2007, the State filed its response to motions by Defendants to modify the Scheduling Order. *See* DKT #1322. In that response, the State proposed that the deadline for its non-relief-related expert reports (*i.e.*, reports addressing conduct, causation and injury) be August 4, 2008, and that the deadline for its relief-related expert reports (*i.e.*, reports addressing damages, injunctive relief, abatement orders, monitoring requests, buffer strips, remediation plans, etc.) be January 5, 2009. *See* DKT #1322, p. 13. Magistrate Judge Joyner treated the State's response as a motion to modify the scheduling order. *See* DKT #1495, pp.1-2.

On November 6, 2007, Magistrate Judge Joyner held a hearing on matters pertaining to the scheduling order. At that hearing, the State explained the import of making the scheduling delineation between non-relief-related expert reports and relief-related expert reports.

Specifically, counsel for the State explained:

Mr. Bullock: It is the question of how you describe these second range of reports. Presently they're referred to as the reports on damages. . . . what we're trying to get at with the division and what -- when I originally discussed this with the Court what we were trying to get at is that in the first phase of experts, what we would submit is our -- the causation piece and the injuries. You know, those -- the basics of fate and transport, the basics of how has the -- what injuries have resulted from this contamination. The second phase would be looking at damages and remedies. Damages are not, as the Court is well aware, a stand alone piece. Damages change according to how you design the remedies. And you can't really begin designing the remedies until you know what the injuries are. And so, it doesn't really make sense, that is unless you're a defendant and you want to be sure that plaintiff doesn't have a chance to really look at the injuries and then design a remedy, to say you're going to do the remedies at the same time that you

do the injuries. Until you get the injuries you really can't start on the remedy work.

The Court: You always assume that damages meant quantification of the monetary damage which would become after the discussion of the injury, of course.

Mr. Bullock: But it also has – I mean, part of that is the question of, well, what can be accomplished by, for instance, injunctive relief so that what amount of – what is left to be compensated in the way of damages. Until you get that complex picture together into one place, you're really taking it in divisions which are very artificial and do not recognize their interplay.

Nov. 6, 2007 Hearing Transcript, 194:22-196:7

On November 15, 2007, Magistrate Judge Joyner entered the Amended Scheduling Order. DKT # 1495. This Order failed to properly take into account the import of making the scheduling delineation between non-relief-related expert reports and relief-related expert reports, requiring that the State's non-*damages* expert reports be due on April 1, 2008 and that the State's *damages* expert reports be due on January 5, 2009.

The State timely sought reconsideration of the Amended Scheduling Order. *See* DKT #1386. On January 15, 2008, Magistrate Judge Joyner denied reconsideration. DKT #1459.

III. Legal Standard

Federal Rule of Civil Procedure 72(a), which governs nondispositive orders by Federal Magistrate Judges, states that “[a] party may serve and file objections to the order within 10 days after being served with a copy.” Rule 72(a) also states that, “the district judge to whom the case is assigned shall consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.” A finding of fact is clearly erroneous if it is without factual support in the record. *Weyerhaeuser Co. v. Brantley*, 2007 WL 4443244 (10th Cir. Dec. 20, 2007).

IV. Argument

The January 15, 2008 Order and Opinion specifies that the Amended Scheduling Order deadline for expert reports of April 1, 2008 is for injury and causation reports, as well all “issues of remediation and affirmative relief.” *See* DKT # 1459 at 2. The January 15, 2008 Order and Opinion specifies that only the “very focused area of monetary damages” is reserved for the January 5, 2009 damages expert report deadline. *See id.* This ruling is clearly erroneous because it failed to properly take into account the complex nature of the instant case and the important fact that the alleged injury must be identified and quantified by the State’s experts before information and opinions about effective forms of relief can be fully developed.

On April 1, 2008, the State will provide its expert reports regarding the injuries and causation elements of this case. Only after the nature and severity of the injuries are characterized by the State’s experts, however, can expert opinions be finalized regarding the methodologies that should be implemented to remediate the Illinois River Watershed. Although some general work can be done regarding potential forms of relief prior to the final assessment of the injury, key parts of those opinions cannot be finalized without the completion of the injury reports.

For example, crop removal, soil removal, or soil treatments are potential forms of relief that could be appropriate to reduce the flow of phosphorus into the waters of the Illinois River Watershed. However, until the experts finalize their opinions about the manner in which phosphorus is reaching the Illinois River, the determination of whether crop removal, soil treatments, or soil removal would be feasible, where they should occur, and the extent to which they should occur cannot be fully developed.

Other examples of potential relief are securing buffer strips and riparian easements which may help slow the transport of phosphorus from fields with highly-elevated soil tests phosphorus levels caused by land application of poultry waste to the waters of the Illinois River Watershed. But again, in order to determine whether these forms of relief would be feasible to address the injuries to the Illinois River Watershed, the locations where they would be most effective, and how many of them would be necessary to have a positive impact requires a full understanding of the scope of the injury.

Relief to address the sediments and oxygen levels in Lake Tenkiller also may be appropriate in this case. But again, until the scope and severity of the injury to Lake Tenkiller is determined with specificity by the State's experts, whether this relief would be feasible, and the extent to which it should occur cannot be fully developed.

The correct mix and placement of remedial actions, the extent of relief they could provide, how much they would cost and whether they would be cost effective to address the injuries to the Illinois River Watershed cannot be determined with specificity until the injuries themselves are fully articulated by the experts who are working towards meeting the April 1, 2008 deadline for disclosing their opinions. The experts who will provide opinions regarding the best and most cost effective forms of relief in this case, and the price tag for that relief, will rely upon the identification and quantification of the injuries set forth by the experts who are diligently working towards providing their reports on April 1, 2008.

In short, the range of concrete, specific solutions for the injuries the State has suffered cannot be fully identified until the injuries themselves are fully characterized by the State's experts. The fact of the matter is that the development of evidence regarding the injury, and then the remedial actions that should be taken to address that injury, require a two-step process and

the first step needs to be finalized before the second step can be fully developed. That the Amended Scheduling Order and the Opinion and Order failed to take into account this fundamental fact about how evidence in this case will develop amounts to clear error.

If forced to go forward under the Amended Scheduling Order, the State will inevitably be required to supplement and amend its expert opinions regarding relief, which will lead to frustration for both parties and undoubtedly create motions for extensions of time, motions to exclude opinions and other unnecessary conflicts which could easily be avoided by redefining these deadlines in a manner that is logical and consistent with the nature of this case. Despite all of this, the Opinion and Order “finds no substantive reason to grant the request.” DKT# 1459, p. 2. Clearly, by ignoring the nature of this case, and logical development of the evidence about relief which must be developed from the evidence about the injury, the Magistrate Judge has committed a serious mistake that will impede this case and which constitutes clear error.

Having the deadline for the State's expert reports on all forms of relief due on January 5, 2009, will prevent prejudice to the State and will not delay or prejudice either party. It will allow the case to move forward in a logical manner and facilitate orderly discovery.

V. Conclusion

For the reasons stated herein, the State respectfully requests that this Court vacate the portion of the Amended Scheduling Order regarding the deadlines for disclosure of the State's expert reports, and enter an order that sets the following deadlines:

1. State's expert reports on injury and causation and all other issues except relief -- April 1, 2008; and
2. State's expert reports on relief -- January 5, 2009.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2008, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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